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Unsung bin Rasad v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05(M)-512–11 OF 2017
TENGKU MAIMUN, ABANG ISKANDAR AND MARY LIM JJCA
24 MAY 2019

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Criminal Law — Murder — Intention — Accused carried knife at his hip when he confronted his brother at home for money — Whether coming armed to confrontation showed premeditation/intention to cause bodily injury — Whether credible evidence at trial showed victim was unarmed — Whether accused took unfair advantage of situation when he fatally stabbed victim instead of walking away from quarrel — Whether nature of stab wound showed high probability of causing imminent and inevitable death — Whether ingredients constituting offence of murder under s 300(c) of the Penal Code had been proven against accused — Whether accused's lie that he took knife from kitchen wall to defend himself when victim tried to slash him with parang only corroborated his guilt

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Criminal Procedure — Defence — Defence of sudden fight — Whether accused succeeded in proving defence on balance of probabilities — Whether all that took place before accused fatally stabbed his brother only verbal quarrel and not fight — Whether eye-witnesses contradicted accused's contention that victim punched accused in face and tried to slash him with parang — Whether prosecution witnesses never spoke of any parang nor was the matter of parang put to eye-witnesses or police investigating officer in cross-examination — Whether failure to cross-examine on such crucial issue meant acceptance of adverse party's evidence — Whether accused's raising of issue of parang for first time when giving evidence was attempt to create impression that there was fight — Whether accused's defence was afterthought

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The appellant ('accused') was convicted and sentenced to death by the High Court for murdering his brother ('Ngadil') by stabbing him twice in the chest with a knife during a verbal quarrel. The incident, which happened in Ngadil's squatter house where the accused also stayed, was witnessed by Ngadil's wife ('PW1') and his daughter ('PW2'). According to the prosecution's case, on the evening of the fateful day, a quarrel between the brothers erupted when the accused asked Ngadil for money for helping him in his job. During the quarrel, the accused stabbed Ngadil with a knife and then ran out of the house but was caught by the neighbours who heard PW1's screams for help. Police later arrested the accused and recovered the knife. The post-mortem report showed that the first stab wound had so severely pierced Ngadil's heart and lung and

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caused massive blood loss that his death was imminent and inevitable. The accused pleaded the defence of sudden fight in answer to the murder charge. In his testimony under oath, the accused alleged that during the quarrel Ngadil had suddenly punched him in the face and then tried to slash him with a *parang* and that, in retaliation, he took a knife from the kitchen wall and stabbed Ngadil twice in the chest before running away and throwing away the knife in the process. In her testimony, PW1 made no mention of any *parang* or of Ngadil trying to slash the accused with one. She also said that the accused was carrying the knife at his hip and that it was not from her kitchen, nor had she seen the knife before the incident. The existence of the *parang* was never put to PW1 or the investigating officer ('PW9') when they were cross-examined, which led the trial judge to conclude that the accused's defence was an afterthought. The trial judge found the evidence given by PW1 and PW2 to be more credible than that of the accused and that there had only been a verbal quarrel between the two brothers and not a fight. At the end of the trial, the trial judge held that the accused had failed to prove his defence of sudden fight on balance of probabilities and had not cast a reasonable doubt on the prosecution's case. The only ground taken by the accused in his instant appeal against conviction and sentence was that the trial judge erred in rejecting his defence of sudden fight which, if it had been upheld, would have reduced the charge to culpable homicide not amounting to murder. The accused submitted that it was never proven that he had a premeditated intention to kill Ngadil.

Held, unanimously dismissing the appeal and affirming the conviction and sentence:

(1) There was no fight between the accused and Ngadil prior to the fatal stabbing but only a verbal quarrel, as was acknowledged by PW1 and PW2. There was no fight as understood and defined by Ratanlal and Dhirajlal in their acclaimed book *The Law of Crimes* (24th Ed) wherein it was stated that 'fight' conveyed something more than a verbal quarrel; 'fight' postulated a bilateral transaction in which blows were exchanged; a combat; in order to constitute fight, it was necessary that blows should be exchanged even if they did not all find their target. The trial judge preferred the evidence of the prosecution witnesses as more credible than that of the accused especially on Ngadil's alleged use of a *parang*. No mention was made by the prosecution witnesses of any *parang* in their evidence. The issue of the *parang* was only raised when the accused gave his evidence. It was never put to PW1, PW2 or PW9 when they were cross-examined. The failure to cross-examine on the matter of the *parang* amounted to an implied acceptance of the adverse party's evidence and the accused was not allowed to challenge it later. Clearly, the matter of the *parang* was an afterthought created to give the impression that there was a fight between the brothers when the credible evidence showed that there was none (see paras 25–26 & 35–36).

(2) The accused took an unfair advantage of the situation. Instead of immediately leaving the house after the quarrel, he took a knife from his hip and stabbed Ngadil, who was unarmed, twice in the chest with sufficient force to rip through his heart and lung thus causing his imminent and inevitable death. The accused had the knife on his person and it was easily and readily available for use. That was why he tried to create the story that he had taken the knife from the kitchen wall after Ngadil had allegedly tried to slash him with a *parang*. But PW1 testified that it was not their knife and that she had not seen it before. Intention might be formed at the spur of the moment and the fact that the accused was armed with a knife lent support to such a finding. The accused had lied on a material point relevant to his defence of sudden fight. Telling a lie amounted to a corroboration of his guilt and it assisted the prosecution's case (see paras 24, 31 & 33–34).

(3) The trial judge did not commit any misdirection in deciding that the accused had failed to establish on balance of probabilities his defence of sudden fight. The totality of the evidence led by the accused was less probable compared to the totality of the evidence led by the prosecution's witnesses pertaining to what happened in Ngadil's house in relation to the defence of sudden fight. The trial judge was also not wrong in finding that the accused had failed to raise any reasonable doubt as to his guilt and that the prosecution had proven its charge against him beyond reasonable doubt. There was no reason to disturb the trial judge's decision (see para 37).

[Bahasa Malaysia summary

Perayu ('tertuduh') telah disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana membunuh abangnya ('Ngadil') dengan menikamnya dua kali di dada dengan pisau semasa pertengkaran lisan. Kejadian yang berlaku di rumah setinggan Ngadil di mana tertuduh juga tinggal, disaksikan oleh isteri Ngadil ('PW1') dan anak perempuannya ('PW2'). Menurut kes pihak pendakwaan, pada waktu petang hari malang tersebut, pertengkaran antara adik-beradik tersebut meletus apabila tertuduh meminta Ngadil wang untuk menolongnya dalam tugasnya. Semasa pertengkaran tersebut, tertuduh menikam Ngadil dengan pisau dan kemudian berlari keluar rumah tetapi ditangkap oleh jiran-jiran yang mendengar jeritan PW1 untuk mendapatkan bantuan. Polis kemudian menangkap tertuduh dan menjumpai pisau tersebut. Laporan bedah siasat menunjukkan bahawa luka tikaman pertama telah menusuk jantung dan paru-paru Ngadil dengan parah dan mengakibatkan kehilangan darah yang banyak sehingga kematiannya tidak dapat dielakkan. Tertuduh memplid pembelaan pergaduhan tiba-tiba sebagai jawapan atas tuduhan membunuh. Dalam keterangannya di bawah sumpah, tertuduh mendakwa bahawa semasa pertengkaran Ngadil tiba-tiba menumbuknya di muka dan kemudian cuba menetaknya dengan parang dan, sebagai balasan, dia

mengambil pisau dari dinding dapur dan menikam Ngadil dua kali dalam dada sebelum lari dan membuang pisau dalam proses tersebut. Dalam testimoninya, PW1 tidak menyebut mana-mana parang atau Ngadil yang cuba menetak tertuduh dengannya. Dia juga menyatakan bahawa tertuduh membawa pisau di pinggulnya dan bukan dari dapur, dan juga dia tidak melihat pisau sebelum kejadian tersebut. Kewujudan parang tidak pernah dikemukakan kepada PW1 atau pegawai penyiasat ('PW9') ketika mereka disoal balas, yang menyebabkan hakim bicara menyimpulkan bahawa pembelaan defendan adalah satu yang difikirkan kemudian. Hakim bicara mendapati keterangan yang diberikan oleh PW1 dan PW2 adalah lebih kredibel daripada tertuduh dan hanya terdapat pertengkaran lisan antara dua adik-beradik dan bukan pergaduhan. Pada akhir perbicaraan, hakim bicara memutuskan bahawa tertuduh telah gagal untuk membuktikan pembelaannya pergaduhan tiba-tiba di atas imbangan kebarangkalian dan tidak menimbulkan keraguan munasabah terhadap kes pendakwaan. Satu-satunya alasan yang diambil oleh tertuduh dalam rayuannya ini terhadap sabitan dan hukuman adalah bahawa hakim bicara terkhilaf dalam menolak pembelaannya terhadap pergaduhan tiba-tiba yang, jika ia disahkan, akan mengurangkan tuduhan kepada homisid salah yang tidak menjumlahkan kepada pembunuhan. Tertuduh berhujah bahawa ia tidak pernah dibuktikan bahawa dia mempunyai niat dirancang terlebih dahulu untuk membunuh Ngadil.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Tiada pergaduhan antara tertuduh dan Ngadil sebelum tikaman maut tetapi hanya pertengkaran lisan, seperti yang diakui oleh PW1 dan PW2. Tiada pergaduhan seperti yang difahami dan ditakrifkan oleh Ratanlal dan Dhirajlal dalam buku *The Law of Crimes* (24th Ed) di mana ia dinyatakan 'pergaduhan' menyampaikan sesuatu yang lebih daripada pertengkaran lisan; 'pergaduhan' memerlukan transaksi dua hala di mana pukulan bertukar; pergelutan; untuk menimbulkan pergaduhan, adalah perlu bahawa pukulan harus bertukar walaupun mereka tidak semua menemui sasaran mereka. Hakim bicara memilih keterangan saksi pendakwaan sebagai lebih dipercayai daripada tertuduh terutama mengenai penggunaan parang oleh Ngadil. Tiada sebutan dibuat oleh saksi pihak pendakwaan tentang mana-mana parang dalam keterangan mereka. Isu parang hanya dibangkitkan apabila tertuduh memberikan keterangannya. Ia tidak pernah dikemukakan kepada PW1, PW2 atau PW9 apabila mereka disoal balas. Kegagalan untuk menyoal balas mengenai parang adalah penerimaan tersirat keterangan pihak yang menentang dan tertuduh tidak dibenarkan untuk mencabarnya selepas itu. Jelaslah, soal parang tersebut merupakan satu pemikiran semula yang dibuat untuk memberi gambaran bahawa terdapat pergaduhan antara adik-beradik apabila keterangan yang boleh dipercayai menunjukkan bahawa ianya tiada (lihat perenggan 25–26 & 35–36).

(2) Tertuduh mengambil kesempatan tidak adil terhadap situasi tersebut. Daripada segera meninggalkan rumah selepas bergaduh, dia mengambil pisau dari pinggulnya dan menikam Ngadil, yang tidak bersenjata, dua kali di dada dengan kekuatan yang cukup untuk merobek jantung dan paru-paru sehingga menyebabkan kematian yang tidak dapat dielakkan. Tertuduh mempunyai pisau pada dirinya dan mudah dan sedia untuk digunakan. Itulah sebabnya dia cuba mencipta cerita bahawa dia telah mengambil pisau dari dinding dapur selepas Ngadil didakwa telah cuba menetaknya dengan parang. Tetapi PW1 memberi keterangan bahawa ia bukan pisau mereka dan dia tidak melihatnya sebelum ini. Niat mungkin dibentuk pada ketika ini dan hakikat bahawa tertuduh bersenjata dengan pisau menyokong kepada keputusan sedemikian. Tertuduh telah berbohong pada satu titik material yang berkaitan dengan pembelaannya terhadap pergaduhan tiba-tiba. Menipu menjumlahkan sokongan kesalahannya dan ia membantu kes pihak pendakwaan (lihat perenggan 24, 31 & 33–34).

(3) Hakim bicara tidak melakukan sebarang kesalahan dalam memutuskan bahawa tertuduh telah gagal untuk membuktikan imbangan kebarangkalian pembelaan pergaduhan tiba-tiba. Keseluruhan keterangan yang dibawa oleh tertuduh adalah kurang mungkin berbanding dengan keseluruhan keterangan yang dibawa oleh saksi pihak pendakwaan yang berkaitan dengan apa yang terjadi di rumah Ngadil berhubung pembelaan pergaduhan tiba-tiba. Hakim bicara juga tidak salah apabila mendapati tertuduh gagal menimbulkan keraguan munasabah terhadap kesalahannya dan bahawa pihak pendakwaan telah membuktikan dakwaan terhadapnya melampaui keraguan munasabah. Tiada sebab untuk mengganggu keputusan hakim bicara (lihat perenggan 37).]

Notes

For cases on defence in general, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2191–2320.

For cases on intention, see 4(2) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1960–1972.

Cases referred to

AEG Carapiet v AY Derderian [1961] AIR Cal 359, HC (refd)

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

B (children) (sexual abuse: standard of proof), Re [2008] 4 All ER 1; [2008] UKHL 35, HL (refd)

Browne v Dunn [1893] 6 R 67, HL (refd)

Hainie bin Hamid v Pendakwa Raya [2003] 2 MLJ 403; [2003] 2 CLJ 141, CA (distd)

Miller v Minister of Pensions [1947] 2 All ER 372, KBD (refd)
Muhammad Faizal bin Dzulkifli v PP [2017] 2 MLJ 228; [2017] 3 CLJ 424, CA (refd)
PP v Seow Khoon Kwee [1989] 2 MLJ 100, HC (distd)
R v Lucas [1981] 2 All ER 1008, CA (refd)
R v Wood Green Crown Court ex parte Taylor [1995] Crim LR 879, QBD (refd)
Rikky Purba v PP [2014] 4 MLJ 569; [2014] 3 CLJ 607, CA (refd)
Soh Cheow Hor v Regina [1960] 1 MLJ 254, CA (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Virsa Singh v State of Punjab 1958 AIR 465, SC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)

Legislation referred to

Penal Code ss 299, 300, 300(c), Exception 4, s 302
Penal Code [IND] s 300 cl thirdly

Sharatha Masyaroh bt John Ridwan Lincon (Lincon & Co) for the appellant.
Hamdan bin Hamzah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

THE CHARGE

> Bahawa kamu pada 3hb Mei 2016 jam lebih kurang 6.40 petang, bertempat di sebuah rumah tidak bernombor, Kampung Kamar Mayat, di dalam daerah Semporna, di dalam negeri Sabah, telah melakukan bunuh dengan menyebabkan kematian ke atas Ngadil bin Rasad (L/41 tahun, tiada keterangan diri), oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Kesiksaan.

BRIEF FACTS OF THE CASE

[1] Ngadil bin Rasad ('the deceased') and Unsung bin Rasad ('the accused') were brothers. The deceased and his family lived in a squatter house built in a swampy area at Kampung Kamar Mayat, Semporna, Sabah. The house is connected to the main land by a narrow catwalk. The accused had been staying with the deceased for about four or five months prior to the incident. The deceased was a house builder and the accused used to assist him.

[2] On 3 May 2016 at about 6.40pm the deceased came home after work. The accused was already in the house. When the deceased entered into the house, the accused confronted the deceased asking for his salary. A quarrel then ensued. The accused took a knife and stabbed the deceased twice. This incident was witnessed by the deceased's wife, Fatma bt Asandin ('PW1') and daughter, Elsa bt Ngadil ('PW2'). The accused then ran out of the house. PW1 also ran

out of the house and shouted for help. The neighbours who lived nearby heard the shouts and gave chase of the accused.

[3] With the assistance of Const Mohamad Shawalruddin bin Abdullah ('PW5') who happened to be at the vicinity, the accused was later arrested. The knife used by the accused in stabbing the deceased was later recovered at the place of arrest.

[4] The accused was charged with the abovementioned charge. At the end of the prosecution's case, the learned High Court judge found that the prosecution had established a prima facie case. Thus, called the accused to enter his defence.

[5] The accused had elected to give sworn testimony on oath. Briefly, in his evidence, he said that in the morning of 3 May 2016, he was at the deceased's house. The deceased was about to go to work. The deceased told him that he did not need to follow him (the deceased) to work because there was no more job. He then told the deceased that if he (the deceased) had received payment for the job, he should give him some money, even for a mere sum of RM30.

[6] The deceased did not have the money and none was given to the accused. Curt words were apparently uttered by the deceased to the accused. A quarrel between the brothers ensued when according to the accused, the deceased had suddenly punched his face. According to the accused again, the deceased suddenly took a *parang* and slashed it at the accused, but it missed him. Realising that the deceased wanted him dead, the accused then took a knife from the kitchen wall and with it he stabbed the deceased twice, both at his chest, from which he fell to the floor. The deceased then shouted that if he (the deceased) died, they should chase and kill him (the accused). The accused then ran away and threw the knife into the swamp along the catwalk area leading to the house from the main road. With regards to the knife, as he ran out from the house, he threw the knife from the middle of the swamp near the catwalk area in front of the said house.

[7] The accused was subsequently apprehended and was charged with the murder of his brother. He pleaded a defence of sudden fight, an exception to s 300 of the Penal Code.

AT THE HIGH COURT

[8] At the end of the prosecution's case, the learned trial judge was satisfied that upon a maximum evaluation of the evidence adduced by the prosecution before him, the prosecution had established a prima facie case against the accused as per the charge. Having heard the evidence led by the accused in

attempting to erect a defence premised on sudden fight pursuant to the fourth exception to s 300 of the Penal Code, at the end of the whole case, the learned trial judge found that the accused had failed to prove his defence on the balance of probabilities and to cast any reasonable doubt on the prosecution's case. As such, it was his finding that the prosecution had successfully proven its case beyond reasonable doubt on the proffered charge. Therefore, the court found the accused guilty under s 302 of the Penal Code. The learned trial judge proceeded to convict the accused and sentenced him to death by hanging. Thus, this appeal before us.

THE APPEAL

[9] Before us, the learned defence counsel ('the DC') submitted that the prosecution had failed to prove that the accused had the premeditated intention of causing death to the deceased. In fact, it was urged upon us that, all the evidences and testimonies when taken as a whole, had overwhelmingly shown that there was established by the accused the partial defence of sudden fight. Learned counsel had cited before us, among others the cases of *Hainie bin Hamid v Pendakwa Raya* [2003] 2 MLJ 403; [2003] 2 CLJ 141 ('the *Hainie* case') and *Public Prosecutor v Seow Khoon Kwee* [1989] 2 MLJ 100 ('the *Seow Khoon Kwee* case') in support of her submissions.

[10] The DC submitted before us she would only be pursuing the issue pertaining to the accused's professed defence of sudden fight, which if successful, would have the effect of reducing the charge to culpable homicide not amounting to murder.

[11] Now, s 299 of the Penal Code states what would in law amount to culpable homicide. It states as follows:

> 299 Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

[12] Section 300 of the Penal Code states that culpable homicide is murder if it is committed in the four manners as described thereunder. But if an accused person can bring the circumstances surrounding his defence within one of the five *excepted* situations mentioned under that s 300 of the Penal Code, his impugned conduct will not amount to murder, but one of culpable homicide *not* amounting to murder. One of the exceptions listed under s 300 of the Penal Code pertains to sudden fight. We reproduce the said exception to s 300 of the Penal Code upon which the accused person was relying as his defence to the charge proffered against him. It reads as follows:

> Exception 4 — Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner. Explanation — It is immaterial in such cases which party offers the provocation or commits the first assault.

[13] As such, the accused person will have to prove the following elements required in the defence of sudden fight under s 299 of the Penal Code, which are as follows:

(a) it was a sudden fight;

(b) there was no premeditation;

(c) the act was committed in a heat of passion; and

(d) the assailant had not taken undue advantage or acted in a cruel manner.

[14] It is also important to not forget that an accused person desirous of taking advantage of this defence of sudden fight bears the onus or burden of proving that defence within the ambit of the exceptions provided for under s 300 of the Penal Code, on the standard of proof, which is one that is on the balance of probabilities. First, it would be apt to refer to s 105 of the Evidence Act 1950, which states:

> 105 Burden of proving that case of accused comes within exceptions. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

[15] As to the standard of proof that is incumbent on an accused to discharge in order to avail himself of any of the general exceptions, including Exception 4 under s 300 of the Penal Code, the law is settled. We needed only to refer to the decision of this court in the case of *Rikky Purba v Public Prosecutor* [2014] 4 MLJ 569; [2014] 3 CLJ 607, where the court, having reviewed the authorities, had held, inter alia, as follows:

> It is an established principle of criminal jurisprudence that the defence is not required to prove its case with the same rigour as the prosecution and the defence is only *required to prove its case on the balance of probabilities to entitle him to rely on any general exceptions of the PC* (*see s 105 of the Evidence Act*). (Emphasis added.)

[16] But having said that, that standard required of an accused to discharge on the balance of probabilities is higher than just to raise a reasonable doubt on the prosecution's case. To establish a case on a balance of probabilities is similar to a party in a civil case having to convince the court to enter judgment in his

favour. In the celebrated case of *Miller v Minister of Pensions* [1947] 2 All ER 372, Denning J (as he then was) said:

> If the evidence is such that the tribunal can say 'we think it more probable than not' the burden is discharged, but if the probabilities are equal it is not.

[17] That would invariably require that party involved having to lead or adduce affirmative evidence to prove his case, as the court shall presume the absence of those circumstances, to reach a level of proof of at least 51% probability against his adverse party. We would cite the English case of *Re B (children) (sexual abuse: standard of proof)* [2008] 4 All ER 1; [2008] UKHL 35, where Lord Hoffman had used a mathematical analogy to illustrate what needed to be proven by a party desirous of having judgment entered in his favour, like so:

> If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened.

THE ACCUSED'S DEFENCE

[18] Essentially, the defence of the accused in this case had been that he had come to the deceased's house, to collect some money from the deceased who was his brother. The money was apparently his pay for helping his brother performe building works. His brother told him that he had not been paid for his work and as such he had no money to pay the accused his wages. The accused person was adamant and according to him, a sum of RM30 from his brother would suffice for the moment. A quarrel ensued and according to the accused, his brother punched his face. He resisted retaliating and his brother took a *parang* and slashed at him but missed. According to him, his brother's brother-in-law who was there did not try to stop the fracas. That made the accused think that they wanted him dead. The accused then took a kitchen knife and with that knife, he stabbed his brother in the chest. According to him, his brother fell to the floor and he then heard his brother say out loud to the effect that if he, meaning the brother, were to die, the accused should be caught and be killed. The accused then ran out of the house and on the way while fleeing the brother's house, he said he threw away the knife that he had used to stab his brother in the chest into the swamp area nearby. He was subsequently apprehended by people in the neighbourhood who heard cries/shouts for help by his brother's wife and daughter, who had testified that

they witnessed the quarrel between the brothers that had later resulted in the death of the deceased.

OUR DELIBERATIONS AND FINDINGS

[19] At this juncture, it is worth noting that the version of events narrated by the accused person differed from what was narrated by PW1, who was the wife of the deceased as to what had happened in the deceased's house on that fateful evening. In her evidence, PW1 testified that the accused had stabbed the deceased twice in the chest, with a knife which he had brought along with him that he had placed at his hip. She said she had never seen that knife before that day. She never mentioned in her testimony that her husband had slashed a *parang* at the accused person. It was in her evidence as well that the accused had slashed the knife at her along the catwalk after she went out of the house shouting for help.

[20] During the cross-examination of PW1 by the DC, it was not put to her that the deceased had slashed at the accused person with a *parang*. Neither was the investigating officer, Insp Jamal bin Tampak (PW9) Neither was the investigating officer, Insp Jamal bin Tampak (PW9) cross-examined on the matter of the *parang*. These were matters that did not escape the notice of the learned trial judge. In the course of trying to resolve which of the two versions was more probable, the learned trial judge had, after assessing the testimonies of the witnesses and the accused person, made a finding of fact that PW1 was more credible than the accused person. Having considered the evidence, while noting that there were some minor discrepancies in their evidence before him, the learned trial judge had made the following finding of fact at para 17 of his grounds of judgment, like so: 'I have no doubt that both PW1 and PW2 are crediblewitnesses'.

[21] The learned trial judge also concluded that the version of the accused person smacked of an afterthought. He had so concluded as such at para 32 of his grounds of judgment, like so:

> [32] In this respect, there are two different version [sic] of the event that took place in the said house. It had never been the prosecution's case that there was sudden fight that took place on that fateful day. While both PW1 and PW2 stated that the accused and the deceased had a quarrel, they did not state that the quarrel had escalated into a fight. Further, both PW1 and PW2 were never asked about this issue during cross-examination, giving rise to an inference that the defence of sudden fight is an afterthought.

[22] Nevertheless, the learned trial judge did not stop there. He continued to consider and appreciate the defence that was put up by the accused person, namely that there was a sudden fight between him and his brother. The trite law

is that the defence of an accused person must be considered however weak it may appear to be. The proper appreciation of the effect of an afterthought or belated defence was clearly explained by learned Justice Edgar Joseph Jr in the case of *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209 at p 218; [1996] 1 CLJ 705 at p 707 as so:

> it is settled law that, although a court may view with suspicion a defence which has not been put to the appropriate prosecution witnesses who might have personal knowledge of the points at issue, the court is still bound to consider the defence, however weak, and to acquit if not satisfied that the prosecution has discharged the burden of proof which rests upon it.

(See also this court's judgment in the case of *Muhammad Faizal bin Dzulkifli v Public Prosecutor* [2017] 2 MLJ 228; [2017] 3 CLJ 424).

[23] The learned trial judge considered whether the accused person had established the four elements that needed to be proven by the accused person under the Exception 4 to s 300 of the Penal Code.

[24] On the issue of premeditation, PW1 said the knife used by the accused to stab her husband was not hers, and that she was not familiar with it. PW1 testified that she saw the accused taking a knife from his hip. This is different fro what the accused had said in his evidence, where he said that he took the knife from the wall in the kitchen area in the deceased's house, after the deceased had allegedly slashed a *parang* at him but had missed. The learned trial judge had preferred the evidence of PW1 to that of the accused person. Intention may be formed at the spur of the moment and the fact that the accused was armed with a knife would lends support to such a finding. The accused had given evidence on oath and he had lied on a material point relevant to his defence of sudden fight. Telling a lie amounts to a corroboration of an accused's guilt, thus assisting the prosecution's case (see the case of *R v Lucas* [1981] 2 All ER 1008, per Lord Lane CJ).

[25] On the element of not taking unfair advantage, the deceased was not armed with a *parang*. The issue on this weapon was never put to PW1 and PW9 the investigating officer Insp Jamal Tampak, during cross-examination when they were in the witness box. The failure of one party to cross-examine the witness of the adverse party, by putting to him or her the version of his story must be taken to mean that version of the adverse party on that issue had been accepted as the truth (see, *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212 and *AEG Carapiet v AY Derderian* [1961] AIR Cal 359). Of course, the *cause celebre* of *Browne v Dunn* [1893] 6 R 67, saw Lord Halsbury in the English House of Lords, stating the following:

> It seems to me to be absolutely essential to the proper conduct of a cause, where it

> is intended to suggest that a particular witness is not speaking the truth on a particular point, to direct his attention to the fact by some questions put in cross-examination.

[26] This rule has since become the gold standard, inter alia, regarding how a cross-examination ought to be managed by trial counsel. Putting one's case to the relevant adverse party's witnesses during their cross-examination is not merely a matter of technical procedure but more importantly, it is also one of substantial justice. It exists to ensure fairness to the witness and to the court in that it gives an opportunity to the party to put his case to a witness in the face of any contradiction, which he plans to make to his testimony. As such, where a party fails to cross-examine a his evidence or on any particular part of it, like in the present appeal (on the failure of the accused person to cross-examine PW1 on the alleged use of a *parang* by the deceased) such failure amounts to an implied acceptance of the evidence and that party is not allowed to challenge it later (see for example the case of *R v Wood Green Crown Court ex parte Taylor* [1995] Crim LR 879).

[27] Having considered the defence' version, the learned trial judge had concluded at para 42 of his grounds of judgment as follows:

> Based on the above reasons, and after considering the evidence before me, I am of the opinion that the accused has failed to prove the defence of sudden fight on the balance of probability. I am also of the opinion that the accused has failed to cast any reasonable doubt on the prosecution's case. I find that the prosecution has successfully proven its case beyond reasonable doubt ...

He then proceeded to convict the accused person for murder under s 302 of the Penal Code.

[28] Murder as defined under s 300 of the Penal Code may be committed in four circumstances as enumerated therein. In this case before us, the prosecution had proven its charge under s 300(c) of the Penal Code. Under that clause, culpable homicide is murder, to wit, if the accused person had intended to cause a bodily injury to another person, and if that intended injury inflicted is sufficient in the ordinary course of nature to cause his death. On conviction, it shall be punishable with a death sentence under s 302 of the Penal Code.

[29] What are the ingredients to be proved in a murder charge premised on the under s 300(c) of the Penal Code? It has been lucidly explained by Vivian Bose J in the leading case of *Virsa Singh v State of Punjab* 1958 AIR 465. He outlines at p 467 the elements to be fulfilled in order to bring a case under cl thirdly of s 300 of the Indian Penal Code (which is in pari materia with s 300(c) of the Malaysian Penal Code) as follows:

> To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300 'thirdly'; First, it must establish, quite objectively that a bodily injury is present; Secondly, the nature of the injury must be proved; these are purely objective investigations; Thirdly, it must be proved that there was an intention to inflict the particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements areproved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under s 300 'thirdly'. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

[30] In the words of the Federal Court bench in the case of *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174, even a single stab can be fatal and can amount to murder. It depended on the risk that was created to the life of the victim. It is culpable homicide not amounting to murder if the bodily injury intended to be inflicted is *likely* to cause death. It is murder, if death is the most probable result as a direct result of the injury so inflicted. In this case, the post mortem report of the pathologist PW10 stated that the first stab wound that pierced through the heart of the deceased had caused severe injury to the lung and the left ventricle of the deceased's heart injury such that there was a massive loss of blood thereby leading inevitably to the death of the deceased. The deceased had no chance of survival, according to the pathologist. The learned trial judge had adverted to this finding by the pathologist and observed in para 21 of his grounds of judgment, which we reproduce below:

> [21] In the instant case, the forensic evidence of PW10 shows that stab wound that pierced through the deceased's heart was the fatal injury sustained by the deceased. This is how PW10 describes the injury:
>
> > A stab wound (labelled 1) was seen on the left chest, measured about 1.5 x 0.5 cm, located 49.5 cm below the vertex and 0.5 cm from midline. The stab injuries were the skin, subcutaneous tissue, the cartilage portion of left 5th rib, anterior aspect of pericardial sac, anterior wall of right ventricle, interventricular septum, posterior wall of left ventricle, posterior aspect of pericardial sac and lower lobe of left lung. Hemopericardium was seen with clots weighed 150 gm. Depth of wound was measured about 15 cm.
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> [22] In no uncertain terms, PW10 stated that the said injury is sufficient in the

ordinary cause [sic] of nature to cause death. A

[31] In most instances, guilty intention or mens rea is a matter that is much left for inferences to be made by the trial court from the peculiar circumstances obtaining in each particular case. In this case, the accused person had the knife kept on his person, to wit, on his hip, which he used to stab the deceased twice at a very critical part of his anatomy, namely his chest and that too with sufficient force to rip through his lung and heart causing severe loss of blood resulting in his imminent and inevitable death. There was no chance of him surviving those fatal stab wounds. With respect, we agreed with the learned deputy public prosecutor appearing for the prosecution respondent that murder as defined under s 300(c) of the Penal Code was proven beyond reasonable doubt. The intended injury inflicted to the chest of the deceased was sufficient in the ordinary course of nature to cause his death. The accused did not deny that he stabbed the deceased, but that he did it in an act of sudden fight under Exception 4 to s 300 of the Penal Code, which *if* proven would relegate the charge to one of culpable homicide not amounting to murder. B C D

[32] The learned DC submitted to us, in the *Hainie*'s case, it was highlighted that this bench in that case had disturbed the verdict of the learned trial judge, in a case involving the invocation of the defence of sudden fight. Suffice for us to state here that there were a few grounds for the appeal justices in the *Hainie*'s case to so act in favour of the appellant before them. First, they found that the learned trial judge had failed to consider the defence of sudden fight; secondly, that the appellant had been convicted for murder based on uncorroborated evidence of the prosecution witnesses who were accomplices. Thirdly, the appeal justices had noted the borderline nature of the evidence relating to the exception. Finally, from the narration of the facts by the learned appeal justices in their grounds of judgment, it was clear that there was a serious fight that had taken place where all the protagonists were armed and were hitting at each other. Their Lordships had concluded that: E F G

> the evidence reveals that the acts of the appellant in the course of the melee leading to the stabbing of the deceased were done within very short intervals apparently with no opportunity for cooling off. As usual in the fight, the blood already heated up was warmed at every subsequent stroke and the voice of reasons was not heard on either side in the heat of passion. Under such circumstances there cannot be much room for discriminating between the respective degree of blame with reference to the state of things either at the commencement of or in the course of the fray. H

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In citing the case of *Soh Cheow Hor v Regina* [1960] 1 MLJ 254, Their Lordships surmised that any doubt must be resolved in favour of the appellant and Their Lordships therefore had set aside the conviction for murder and had it substituted to one for culpable homicide not amounting to murder.

[33] With respect, we could not agree with the submissions of learned DC for the accused in that this court ought to follow in the footsteps of our brother appeal justices in *Hainie*'s case for the clear reason that the factual matrix relating to the 'fight' are entirely different. In our case, there might have been a quarrel, verbal in nature, as found by the learned trial judge, but there was no fight between the brothers. What happened was the accused had stabbed his brother who was unarmed in the chest. On top of that it was manifestly obvious that the accused had taken unfair advantage of the situation. Instead of immediately leaving the house after the quarrel, he took a knife from his hip and stabbed his brother in the chest, a vital part of the human body, not once, but twice. Of course, this, unlike the *Hainie*'s case did not involve evidence of any accomplice that needed independent corroboration. In our case, there have been clear evidence, believed by the learned trial judge as credible witnesses that the accused had committed the offence and that there was no mention by them that the deceased had slashed a *parang* at the accused on that fateful day. As found by the learned trial judge the failure of the accused to put his case to the relevant prosecution witnesses had smacked of an afterthought defence or one that was of recent invention. Such evidence was not subject to be properly ventilated and examined by the adverse witnesses and therefore would not be capable of attracting much, if not any, weight when compared to the evidence of the prosecution witnesses which was subject to the crucible of cross-examination. It was our considered view that the *Hainie*'s case could not be of any assistance to the accused's cause.

[34] Likewise, the reliance by the DC on the case of *Seow Khoon Kwee* with respect, was of no avail, as the factual matrix in that case was also entirely different. It related to the fact that the accused in the *Seow Khoon Kwee* case only picked up the piece of glass with which he had subsequently used to inflict the fatal injury to the deceased during the course of the fight and the court found that the glass was not used in an unusual manner. As such the exception was found as being applicable in favour of the accused in that case. Learned counsel attempted to bring the factual situation obtaining in the accused case within the embrace of that exception by citing the *Seow Khoon Kwee* case in support thereof. However, the factual matrix surrounding this case is materially different to that in the *Seow Khoon Kwee* case. In this case, the accused had his knife on his person during the quarrel with his brother. It was placed at his hip and was easily and readily available for use. Such inference was obvious. That was why the accused tried to create the story that he had used a knife that was obtained from the deceased's kitchen wall *after* the deceased had allegedly slashed a *parang* at him. But as could be seen from the evidence, PW1, the deceased's wife said it was not their knife and that she had not seen it before the moment the accused took it from his hip to stab the deceased. The learned trial judge found the evidence of PW1 to be more credible. As such, the facts of this case did not sit squarely with those obtaining in the *Seow Khoon Kwee* case so as to persuade us to rule the way the court in the *Seow Khoon Kwee* case did. Again,

that case could not help the accused's cause, moving forward.

[35] We reminded ourselves of the words of the learned authors of *Ratanlal and Dhirajlal* in the acclaimed book entitled *The Law of Crimes* (24th Ed) where it was stated therein as regards the element of a sudden fight, as follows:

> The word 'fight' is used to convey something more than a verbal quarrel. 'Fight' postulates a bilateral transaction in which blows are exchanged. It takes two to make a fight. A fight is a combat between two persons. It is not necessary that weapons should be used in a fight. An affray can be a fight even if only one party in the fight is successful in landing a blow on his opponent. In order to constitute fight, it is necessary that blows should be exchanged even if they do not all find their target. The word 'sudden' implies that the fight should not have been pre-arranged.

[36] In this appeal before us, there was no fight between the accused and the deceased prior to the fatal stabbing. There was a *verbal* quarrel, as acknowledged by PW1 and PW2, between the brothers. But there was no fight as understood and defined by the learned authors of Ratanlal and Dhirajlal in the book *The Law of Crimes*. The learned trial judge preferred the evidence of the prosecution witnesses as more credible than that of the accused. This was so especially on the issue of the alleged use of the *parang* by the deceased. No mention was made by the prosecution witnesses on any *parang* in their evidence. This issue on use of *parang* was only raised during the evidence of the accused during his defence. It was never put to PW1, PW2 and the investigating officer PW9 during their respective cross-examination. Clearly it was an afterthought created to give an impression that there was a fight between them, when the credible evidence, as accepted by the learned trial judge showed there was none.

[37] Having considered the applicable legal principles and the evidence that had been adduced before the trial judge, particularly the evidence adduced by the accused to establish his professed defence purportedly couched as Exception 4 to s 300 of the Penal Code, we were unanimous in our view that the learned trial judge had not committed any misdirection in coming to his decision that the accused person had failed to establish on the balance of probabilities his defence of sudden fight with his brother. The totality of the evidence led by the accused person was less probable as compared to the totality of the evidence led by the prosecution's witnesses pertaining to what happened in the deceased's house in relation to his defence of sudden fight. Neither was the learned trial judge wrong when he found that the accused person had failed to raise any reasonable doubt as to his guilt. We agreed with him that the prosecution had proven its charge against the accused beyond reasonable doubt. There existed no reason for us to disturb the learned trial judge's decision in this appeal before us.

A CONCLUSION

[38] In the upshot, we found no merit in this appeal. We had therefore unanimously dismissed this appeal. The conviction entered against the accused person under s 302 of the Penal Code and sentence of death by hanging imposed by learned High Court judge against the accused person were affirmed.

Appeal unanimously dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar